

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #16-78:

AMERICAN ASSOCIATION OF UNIVERSITY
PROFESSORS, E.M.C. CHAPTER, Affiliated
with the NATIONAL AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS,

Complainant,

- vs -

FINAL ORDER

EASTERN MONTANA COLLEGE, JOHN E.
VAN DEWETERING, President,

Respondent.

No exceptions having been filed, pursuant to ARM 24.26.107,
to the Findings of Fact, Conclusions of Law and Recommended
Order issued on August 10, 1979:

THEREFORE, this Board adopts that Recommended Order in this
matter as its FINAL ORDER.

BOARD OF PERSONNEL APPEALS

By


Brent Cronley
Chairman

DATED this 9th day of October, 1979.

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that I
mailed a true and correct copy of the above FINAL ORDER to the
following persons on the 9th day of October, 1979:

Ms. Rosemary Boschert
Attorney at Law
219 Hedden-Empire Building
Billings, MT 59101

President John E. Van DeWeterling
Eastern Montana College
Billings, MT 59101

Dr. Annake-Jan Boden
President, EMC AAUP
2621 Beth Drive
Billings, MT 59101

Mr. Steven A. Vearie
Attorney at Law
Montana University System
33 South Last Chance Gulch
Helena, MT 59601



BEFORE THE BOARD OF PERSONNEL APPEALS

In the Matter of Unfair Labor
Practice Charge No. 16-78:

American Association of University
Professors, E.M.C. Chapter, Affiliated
with the National American Association
of University Professors,

Complainant,

vs.

Eastern Montana College, John E.
Van deWetering, President,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND
RECOMMENDED ORDER

On June 14, 1978, the American Association of University Professors, Eastern Montana Chapter of the National American Association of University Professors (AAUP) filed Unfair Labor Practices (ULP) charges with the Board of Personnel Appeals against Eastern Montana College (EMC), John E. Van deWetering, President, Montana University System. On August 4, 1978, AAUP filed an amendment to ULP 16-78 in compliance with an order issued by the Board of Personnel Appeals on July 24, 1978.

The amended ULP charged EMC as follows:

1. Discrimination in pay schedule with members of a bargaining unit 16-5905(c), (e) R.C.M. 1947 (sic) [59-1605(1)(c), (e)].
2. Negotiating contracts with individual members of a bargaining unit 16-5905(e) R.C.M. 1947 (sic) [59-1605(1)(e)].
3. Interference in the exercise of rights of employees guaranteed in Section 3 (59-1603), 59-1605(a), (b) R.C.M. 1947.

A hearing was held on ULP 16-78, as amended, on October 5, 1978.

INTRODUCTION

In June of 1975, the Board of Personnel Appeals certified a coalition of the American Federation of Teachers and AAUP (Coalition) as the designated bargaining agent for the faculty at Eastern Montana College. The Coalition and EMC signed a collective bargaining agreement on March 23, 1976, with a

1 retroactive effective date of July 1, 1975.

2 In April of 1977, a decertification petition was filed by
3 members of the bargaining unit. On January 25, 1978, a decertifi-
4 cation election was held and the AAUP became the sole bargaining
5 representative for the faculty of Eastern Montana College.

6 Cases interpreting the National Labor Relations Act will be
7 used as persuasive authority in application of Montana's Collec-
8 tive Bargaining Act in accordance with the Montana Supreme Court's
9 holding in State Department of Highways vs. Public Employee Craft
10 Council 165 Mont. 249, 529 P2d 785 at 787 (1974).

11 FINDINGS OF FACT

12 The Contract

13 1. Section 17.200 of the Collective Bargaining Agreement (the
14 Contract) between the Coalition and EMC reads as follows:

15 This Agreement shall be in full force and effect from
16 July 1, 1975, to and including June 30, 1977, and shall
17 be considered as renewed from year to year thereafter
18 unless either party to this Agreement notifies the
19 other party in writing at least 180 days prior to the
expiration of the contract, or any anniversary date
thereafter, of its desire to modify or terminate the
Agreement.

20 2. Letters between Catherine Swift, Staff Attorney, Montana
21 University System and Dr. Stanley Fawcett, Chief Spokesman
22 for the Coalition (Complainant's Exhibit No. 14) clearly
23 establish that the Contract was not opened for modification
24 or terminated under Section 17.200. The automatic renewal
25 provision extended the contract for the period July 1, 1977
26 through June 30, 1978. The decertification election was
27 held January 25, 1978.

28 3. On February 14, 1978, the administration of Eastern Montana
29 College and AAUP agreed in writing to the following:

- 30 a. The provisions of the 1975-77 Faculty Contract shall
31 serve as the interim contract until June 30, 1978, or
32 until a new contract is negotiated and ratified, which-
ever occurs first.
- b. Negotiations for a new contract shall commence immedi-
ately with regard to terms and conditions of employment

- 1 and faculty salaries for the 1977-78 and 1978-79 contract
- 2 years.
- 3 c. In all places in the 1975-77 Faculty Contract, except
- 4 as noted in (d) below, all references to the Eastern
- 5 Montana College Faculty Bargaining Coalition shall be
- 6 changed from "Coalition" to "AAUP" to indicate that the
- 7 Eastern Montana College Chapter of the American Associ-
- 8 ation of University Professors is the agent for the
- 9 Faculty.
- 10 d. The "Coalition-Administration Committee" shall be
- 11 renamed the "Faculty-Administration Committee."
- 12 4. EMC and AAUP verbally agreed at the bargaining table that
- 13 the provisions of the 1975-77 Faculty Contract would serve
- 14 as the interim contract beyond the June 30, 1978 date set
- 15 forth in the agreement signed February 14, 1978.
- 16 5. The 1975-77 Faculty Contract did not contain a table on
- 17 salaries for either 1977-78 or 1978-79.
- 18 6. Section 11.100, II, E, of the Faculty Contract reads in
- 19 part:
- 20 Future faculty employed by EMC may not be paid less
- 21 than the appropriate year's floor schedule salary.
- 22 However, with consent of the Coalition [AAUP], salaries
- 23 may exceed the floor schedule.

24 Charge No. 1

- 25 7. The salaries of bargaining unit members who were under
- 26 contract to Eastern for 1976-77 were frozen by EMC at the
- 27 1976-77 level for 1977-78 and 1978-79. They did not receive
- 28 credit for experience earned after June 30, 1977.
- 29 8. Salaries for 1977-78 new faculty hires (persons not holding
- 30 a contract with Eastern for 1976-77) were set by EMC as
- 31 follows:
- 32 a. EMC computed the "modified years of experience" to
- include experience earned between July 1, 1976 and
- June 30, 1977 and
- b. Used the floor schedule for 1976-77 (set forth on page
- 14 of the 1975-77 Faculty Contract) to set the salary
- amount.

- 1 9. AAUP bargaining unit members were paid different salaries
2 for 1977-78 depending on whether or not they held a contract
3 with Eastern for 1976-77.
- 4 10. Correspondence from the administration, EMC, to the new
5 faculty hires for 1978-79 stated salary offers based on
6 experience earned during the period July 1, 1976 through
7 June 30, 1978.
- 8 11. At the bargaining session held September 25, 1978, EMC
9 verbally proposed that AAUP agree to the payment of the
10 salary amounts stated in letters of appointment sent by EMC
11 to new faculty hires for 1978-79. This request was reduced
12 to writing in the letter of October 4, 1978 (Complainant's
13 exhibit #8).
- 14 12. Correspondence to new faculty member for 1978-79 stating
15 salaries included the statement that such salaries were
16 "subject to collective bargaining."
- 17 13. EMC did not formally confer with AAUP concerning the salary
18 amounts paid to new faculty for 1977-78.

19 Charge No. 2

- 20 14. Memorandum regarding offer to Aaron Hause from Robert J.
21 McRae to Dr. John Van de Wetering dated April 14, 1978
22 states: "By the way, the salary level of \$17,150 includes
23 the summer appointment at a rate of .22 of the ten month
24 contract."
- 25 15. President Van de Wetering's letter of April 17, 1978 reads
26 in part: "I am pleased to offer you an appointment as Serials
27 Librarian, effective September 15, 1978, on an academic year
28 appointment at a salary level of \$17,150, subject to collec-
29 tive bargaining. The salary level of \$17,150 includes the
30 summer appointment at a rate of .22 of your ten month con-
31 tract."
- 32 16. Van de Wetering's April 26, 1978 letter to Hause changed the

- 1 effective date from September 15 to July 1.
- 2 17. The May 31, 1978 Board of Regents agenda item 20-700-R0578
- 3 reads: "*Hause, Aaron, M.L.S. Serials/Documents Librarian to
- 4 replace Jo Self effective July 1, 1978, \$17,150 (FY)
- 5 *subject collective bargaining;" Minutes show item
- 6 approved.
- 7 18. The September 11, 1978 Board of Regents agenda item
- 8 22-700-R0978 reads: "Corrections in 1978-79 Contract
- 9 *Hause, Aaron, M.L.S.
- 10 FR: Serials/Documents Librarian \$17,150 (FY)
- 11 TO: Serials/Documents Librarian \$14,572 (AY)
- 12 *Subject to Collective bargaining"
- 13 19. John McRae testified for EMC that the listing of Aaron Hause
- 14 as an FY employee in Item 20-700-R0578 was a mistake and was
- 15 corrected by Board Item 22-700-R0978 at the Board of Regents
- 16 meeting held September 11, 1978.
- 17 20. Mark Rider's name is on the list attached to the October 4,
- 18 1978 letter from Ken Hickey, Vice President, EMC to Harry
- 19 Gaghan, Spokesman, AAUP. (Complainants exhibit No. 8)
- 20 21. Sections 9.420 and 9.430 of the contract are as follow:
- 21 9.420 TEACHING BEYOND
- 22 RETIREMENT AGE

23 A faculty member who has reached 65 years of age

24 or who has taken early retirement may continue teaching

25 on annual appointment on either a full-time or part-

26 time basis under the following procedure:

27 A written application is submitted to the Admini-

28 strative Unit Head at least four months before the

29 retirement would become effective.

30 The faculty member's application is submitted to

31 his department for its recommendation. The application

32 is then submitted with the departmental recommendation

to the Dean of the appropriate school.

The recommendations of the Administrative Unit Head and appropriate Dean shall be transmitted to the President of Eastern Montana College for his recommendation to the Board of Regents of Higher Education. If the recommendation of the Administrative Unit Head and appropriate Dean are both negative, the application will be deemed rejected.

By December 31 of each subsequent year the faculty member who has reached age 65 or who has taken early

1 retirement shall submit a request to continue teaching.
2 During such years of continued service, the faculty
3 member involved shall be entitled to the continuation
4 of all applicable fringe benefits, with appropriate
5 payroll deduction.
6 The approval of full-time or part-time teaching
7 may be continued up to and including the academic year
8 the faculty member attains age seventy.

9 9.430 END OF TENURE

10 A faculty member's tenure automatically shall
11 terminate when the faculty member reaches age 65 and,
12 thereafter, the faculty member shall be deemed to hold
13 a year-to-year contract, in accordance with the retire-
14 ment procedures set forth above.

- 15 22. EMC president, John Van DeWetering, wrote a memorandum on
16 May 22, 1978 in response to a request for information from
17 the President of AAUP to Dr. Larry Pettit (see Complainant's
18 exhibit #13). Item 3 on page 2 of the memo to Dr. Anneke-
19 Jan Boden reads in part:

20 Generally, what we are able to provide faculty who wish
21 to retire early includes: One academic quarter teaching
22 at one quarter pay until age 65, one final half-summer
23 session, and the pay-out on whatever financial obliga-
24 tion the institution has, such as accumulated leave,
25 accumulated sick leave pay, etc. Those who have chosen
26 to retire this year have been particularly interested
27 in the opportunity to continue teaching for one quarter
28 a year.

- 29 23. The early retirement agreement between EMC and Mr. Miller is
30 dated June 1, 1978. The agreement with Mr. Thompson is
31 dated July 13, 1978.

- 32 24. On September 5, 1978, AAUP and EMC reached the following
tentative agreement (Respondents exhibit #1):

33 9.450 EARLY RETIREMENT

34 A Task Force shall be established by the Faculty-
35 Administration Committee, consisting of two faculty and
36 two administrators, to recommend policies and procedures
37 for early retirement. The task force shall be appointed
38 when the contract is ratified.

39 Final recommendations shall become effective when
40 approved by the AAUP and the Commissioner of Higher
41 Education.

- 42 25. A separate amount of money was not identified as a salary
43 pool for the bargaining unit.
44 26. The contract is silent on the issue of extra compensation
45 for faculty members.

- 1 27. The only contract provision addressing Summer Session is
2 Section 11.300 setting the formula to be used to set salaries.
3 28. E.M.C.'s President testified that the administration used
4 the same procedures for assigning summer session faculty in
5 1978-79 as it did in prior years.
6 29. Karen Olsen and Mike Mulloveny are full-time faculty members
7 in the Health, Physical Education and Recreation Department.
8 Karen Olsen was assigned duties as the assistant women's
9 basketball coach and Mike Mulloveny was assigned duties as
10 the men's track coach. Olsen and Mulloveny were each paid
11 \$1500 for coaching duties.

12 DISCUSSION

13 Format

14 The discussion is divided into three separate parts. Each
15 part deals with one of the three charges stated in the amended
16 ULP. The language of the charge and the referenced section of
17 R.C.M., 1947 are included at the beginning of each part.

18 Part I, Charge 1

19 Discrimination in pay schedule with members of a
20 bargaining unit. 16-5905(c), (e) [sic] R.C.M.,
1947.

21 The administration at Eastern Montana College has
22 failed to negotiate in good faith. The Administration
23 has applied different pay schedules to the
24 faculty within a single bargaining unit. Faculty
25 members employed before the academic year 1977-78
26 were not reimbursed at their current years of
27 experience and current rank appropriate to the
extended 1975-77 contract. New faculty employed
for 1977-78 and others have been paid on the basis
of their years experience at the end of the academic
year 1976-77 while faculty employed before 1977-78
were paid on the basis of their experience at the
end of the academic year 1975-76.

28 Section 59-1605 (1)(c) R.C.M., 1947:
29 It is an unfair labor practice for a public employer
30 to discriminate in regard to hire or tenure of
31 employment or any term or condition of employment
to encourage or discourage membership in any labor
organization.

32 Section 59-1605(1)(c) is parallel to Section 8(a)(3) of the
National Labor Relations Act, 29 USCS Section 158(a)(3). In

1 order to show a violation of 59-1605(1)(c) R.C.M., 1947, it is
2 necessary to prove or infer (1) employer discrimination as to
3 hire or tenure of employment or any term or condition of
4 employment; (2) resulting encouragement or discouragement of
5 membership in a union; and (3) unlawful intent.¹ Employer
6 discrimination consists of treating like classes differently.
7 The necessity of specific evidence of a discriminatory motive
8 depends on which of two categories the employer's act falls into:
9 (1) discriminatory conduct "inherently destructive" of important
10 employee rights, or (2) discriminatory conduct having a
11 "comparatively slight" adverse effect on employee rights.

12 In Great Dane Trailers, Inc.,² the Supreme Court laid down
13 the following rules:

14 (1) If an employer's discrimination is "inherently
15 destructive" of important employee rights, the NLRB can find that
16 an unfair practice has been committed, even without proof of
17 antiunion motivation and even if the employer proves he was
18 motivated by business reasons.

19 (2) If the effect upon employee rights of an employer's
20 discrimination is "comparatively slight," antiunion motivation
21 must be proved in order to find an unfair practice only if the
22 employer has proved the discrimination was for business reasons.

23 (3) If it has been proved that an employer's discrimination
24 could have adversely affected employee rights to some extent, the
25 burden is on the employer to prove that he was motivated by
26 business objectives.

27 Once it has been proven that the employer engaged in
28 discriminatory conduct which could have adversely affected
29 employee rights to some extent, the burden is upon the employer
30 to establish that it was motivated by legitimate objectives since
31

32 1. NLRB v. Brown, 380 US 278, 58 LRM 2663 (1965)

2. NLRB v. Great Dane Trailers, Inc., 388 US 26, 65 LRM 2465 (1967)

1 proof of motivation is most accessible to him.³

2 Mere protestations that he did not intend to encourage or
3 discourage union membership is unavailing where a natural
4 consequence of his conduct was such encouragement or
5 discouragement.⁴

6 Dr. John E. Van deWetering, President, Robert J. McKee,
7 Acting Academic Vice-President, and Kenneth Heikes,
8 Administrative Vice-President, testified for the respondent,
9 Eastern Montana College.

10 The record does not establish a legitimate and substantial
11 business justification for discrimination in salaries paid
12 members of the AAUP bargaining unit for 1977-78 and 1978-79.
13 Dr. Van deWetering, President of EMC, testified that there was
14 no intent to discourage or encourage union membership.

15 The record does contain evidence that the motivation for
16 discriminating in 1978-79 was to "put as much money out front as
17 possible to be competitive" and "that a number of very good
18 candidates in a number of departments were lost because of the
19 uncertainty of the dollars offered [subject to collective
20 bargaining]." This evidence is insufficient to establish
21 substantial business justification.

22 Section 11.100, II, E. was available as a mechanism whereby
23 EMC could have sought the consent of the bargaining agent to
24 exceed the floor schedule in paying new faculty.

25 I find that EMC's discriminatory conduct in paying similarly
26 situated persons in the bargaining unit different salary rates
27 for 1977-78 and 1978-79 could have adversely affected employee
28 rights to some extent. Therefore, EMC had the burden to establish
29 that its conduct was motivated by a legitimate and substantial
30 justification. EMC failed to meet this burden of proof.

31
32 3. NLRB vs. Great Dane, Trailers, Inc., supra note 2.

4. Radio Officer's Union of Commercial Telegrapher's Union
v. NLRB 347 U.S. 17, 33 LHRM 2417(1954)

1 Section 59-1605(1)(e), R.C.M., 1947:

2 It is an unfair labor practice for a public employer to
3 refuse to bargain collectively in good faith with an
exclusive representative.

4 An employer's unilateral action in altering the terms and
5 conditions of employment for new hires without first giving
6 notice to, and conferring in good faith with, the union
7 constitutes an unlawful refusal to bargain.⁵ Wages are a
8 mandatory bargaining subject. The employer must bargain with the
9 union on a mandatory subject. Respondent acknowledges that new
10 employees should have been treated in the same manner as old
11 employees. I find that EMC unilaterally changed the wages of new
12 faculty hires.

13 Part 2, Charge 2

14 Negotiating contracts with individual members of a bargaining
15 unit 59-1605(e) R.C.M., 1947.

16 The administration at Eastern Montana College has
17 bypassed the exclusive representative, A.A.U.P., by
18 engaging in negotiations concerning wages, hours, and
19 other conditions of employment with faculty members on
20 an individual basis since February 14, 1976. The
administration also has discussed terms of employment
such as individual salaries, stipends above and beyond
the salary schedule, early retirement, summer session
employment, and arrangements for 1978 and thereafter.

21 Section 15-1605(1)(e)

22 It is an unfair labor practice for a public
23 employer to refuse to bargain collectively in good
faith with an exclusive representative.

24 Item 1 of Charge 2:

25 INDIVIDUAL SALARIES:

26 Faculty Involved: Arron Hause
Mark Rider

27 Following negotiations for 1975-1977 faculty contract
28 the Administration required all members of the
29 bargaining unit on 12 month and Fiscal year contracts
to contract on the Academic year. The source used for
30 this requirement by the Administration was Section
15-000 of the faculty contract of 1975-1977.
Librarians forced to go to the Academic year contracts
were:

31 Jo Self
32 Winnie Griffith
Joan Mead

5. NLRB v. Katz, 369 U.S. 736, 50 LHRM 2177(1962).

1 When the Administration hired Arron Hause to replace Jo
2 Self as a Librarian and member of bargaining unit he
was hired on a fiscal year contract.

3 Documentation; Staff recommendations of the Board
of Regents meeting May 31, 1978, minutes of May 31,
4 1978, Item no. 28-700-R0578.

5 The administration contract proposal of June 29,
1978, to the faculty negotiating team, contained Section
6 11.7 in which the Administration proposed that all
librarians and counselors be returned to a fiscal year
7 contract basis. In the case of Arron Hause the admini-
stration implemented their intent before it was negoti-
ated into the contract. Mark Rider newly hired for the
8 academic year of 1978-79. The salary schedule was
circumvented and without regard to the contract. Only
9 known information concerning faculty member Rider who
was hired as a Music Therapist is a meeting of July 5,
10 1978 to discuss his conditions and terms of employment
with the Administration.

11 I conclude that the listing of Aaron Hause as a fiscal year
12 employee on the May 31, 1978 Board of Regents' agenda was an
13 error and not unilateral implementation of the subsequent admini-
14 stration's bargaining proposal that librarians be returned to a
15 fiscal year contract.

16 The only information in the record concerning Mark Rider is
17 the inclusion of his name on the list of new faculty hires for
18 1978-79 in which E.M.C. requested AAUP to agree to pay the new
19 hires at the rates quoted to them in letters of correspondence
20 (See Complainant's Exhibit No. 8).

21 Item 2 of Charge 2:

22 STIPENDS ABOVE THE SALARY SCHEDULE

23 Faculty involved: Mike Mullooney \$1500.00
Karen Olsen \$1500.00

24 When faculty is paid stipend above the contract salary
25 schedule the money comes out of the salary pool. Money
26 paid out of the salary pool must be negotiated when it
27 is paid to members of the bargaining unit. Members of
28 the bargaining unit were paid stipends for the academic
year of 1978-1979 without negotiating with the exclusive
bargaining agent.

28 Item 4 of Charge 2:

29 SUMMER SESSION EMPLOYMENT

30 Faculty involved: Dick Edwards
Jere Lee Dobbins

31 Two newly hired faculty for the academic year of 1978-79
were promised summer session employment when they were
32 hired. Simultaneously the administration was demanding
that the bargaining agent, AAUP, negotiate summer
session employment. It is obvious from the proposal
submitted to the AAUP negotiating team Section 11.300
that the Administration wants complete control of

1 summer session employment and implemented that intent
2 before it was negotiated with the bargaining unit.
3 Fiscal year contracts were also tendered to the above
4 faculty members. (Faculty meeting notes, May 11, 1978)

5 In J. I. Case Co.,⁶ the Supreme Court said:

6 Care has been taken in the opinions of the Court
7 to reserve a field for individual contracts...
8 because there are circumstances in which it may
9 legally be used. Men may continue work after a
10 collective agreement expires and, despite nego-
11 tiation in good faith the negotiation may be
12 dead-locked or delayed; in the interim expressed
13 or implied individual agreements may be held to
14 govern.

15 We know of nothing to prevent the employee's
16 making any contract [with the employer] provided
17 it is not inconsistent with a collective agreement
18 or does not amount to or result from or is not
19 part of an unfair labor practice.

20 Individual contracts may not be availed of to
21 defeat or delay the procedures prescribed by the
22 National Labor Relations Act looking to collective
23 bargaining.

24 Individual contracts not used for coercive purposes which
25 are consistent with and subservient to the terms of the collec-
26 tive bargaining agreement are permitted. Individual contracts
27 which continue the status quo and do not contain unilateral
28 changes in regard to terms and conditions of employment which are
29 subjects of collective bargaining are permitted.

30 EMC's contention that the stipends paid to Mullooney and
31 Olsen and that the Summer Session Employment of Edwards and
32 Dobbys were merely continuations of the status quo is uncontra-
dicted. Therefore, I find the action of EMC set forth in Items 2
and 4 of Charge 2 do not violate 56-1605(1)(e).

Item 3 of Charge 2:

EARLY RETIREMENT

Faculty involved: Fred Miller

C. Paul Thompson

Memorandum of February 6, 1978 from Fred Miller to Dr.
John Van De Wetering concerning his possible early
retirement. Correspondence from Miller to Van de
Wetering dated March 16, 1978, in regard to his early
retirement. Memo from Van de Wetering to Miller on
presenting an early retirement proposal. Memo of April
14, 1978, from Larry K. Hannah, Associate Professor,

6. J.I. Case Co. v. NLRB 321 U.S. 332, 14 LRM 561(1944).

1 Communication Arts Department to Miller in regard to
2 summer session employment and early retirement.

3 C. Paul Thompson and the Administration at Eastern
4 engaged in negotiations which culminated in an early
5 retirement contract signed by Commissioner Pettit dated
6 July 14, 1978. Memo to Jay F. Kirkpatrick, Interim
7 Dean from Robert J. McRae, Acting Academic Vice
8 President, dated May 1, 1978 concerning Thompson early
9 retirement and negotiations for early retirement.

10 In determining whether an unlawful refusal to bargain has
11 occurred, usually the conduct of the parties is examined to
12 determine the presence or absence of subjective "good faith".
13 However, certain types of conduct have been held "per se"
14 violations without regard to any consideration of good or bad
15 faith. Unilateral changes by an employer during the course of a
16 collective bargaining relationship concerning matters which are
17 proper subjects of bargaining are normally regarded as "per se"
18 refusals to bargain.⁷

19 Section 9.420 of the Contract sets forth a procedure under
20 which "[a] faculty member. . . who has taken early retirement may
21 continue teaching on an annual appointment on either a full-time
22 or part-time basis."

23 EMC's agreement with Mr. Thompson states that he will be
24 offered to teach during one academic quarter each year through
25 the spring of 1983. The agreement with Miller states that he
26 will have the option of teaching one quarter per year through
27 1982. The fact that the agreements provided for teaching for one
28 quarter time for a period longer than one year is inconsistent
29 with Section 9.420 of the contract.

30 EMC contends that the action taken by them in entering into
31 the retirement agreements with Miller and Thompson are within the
32 scope of the Management Rights Clause or in the alternative that
AAUP waived its right to challenge these agreements by its failure
to negotiate retirement benefits into the 1975-77 contract or to
propose anything during current negotiations.

7. NLRB v. Katz, supra note 5.

1 The Management Rights Clause of the contract, 7.000, reads
2 in part:

3 The policies of the Board and the College shall
4 extend, except as modified by this agreement, to the
5 following: (b) hire, promote, transfer, assign and
6 retain faculty.

7 Any specific provision in the Contract is controlling over
8 the general powers of the Management Rights Clause.

9 Before concluding that AAUP had waived its right to bargain
10 retirement benefits during the negotiations which culminated in
11 the 1975-77 contract it would be necessary to evaluate those
12 negotiations in regard to the subject of retirement benefits and
13 determine whether or not the matter was "fully discussed" or
14 "consciously explored" and "consciously yielded." The record
15 does not contain the evidence necessary to make this finding.

16 The remaining question in regard to the retirement agree-
17 ments is whether or not the union waived its right to bargain
18 after it had knowledge of the action of EMC in regard to the
19 pending agreement with Thompson and Miller. The duty to bargain
20 arises upon request, and where an opportunity exists to bargain
21 but no request is made a waiver may result.⁸

22 AAUP received notice of EMC's action in regard to retirement
23 upon receipt of Dr. Van deWetering's memo of May 22, 1978. The
24 retirement agreement with Miller was signed nine days later and
25 the one with Thompson, July 13, 1978. In the interim on June 14,
26 1978, AAUP filed ULP 16-78 charging EMC with failure to bargain
27 in good faith in regard to the retirement agreements.

28 The Contract between EMC and AAUP was in effect at the time
29 EMC signed individual agreements with Mr. Thompson and Mr. Miller.
30 In addition EMC and AAUP were in the process of negotiating a new
31 collective bargaining agreement.

32 8. Madicenter, Mid South Hospital, 221 NLRB 106, 90 LRM 1576 (1975).

1 EMC and AAUP reached tentative agreement on a retirement
2 provision on September 5, 1978.

3 I find that AAUP did not waive it's right to bargain retire-
4 ment benefits and that EMC's agreements with Mr. Thompson and Mr.
5 Miller contained a provision inconsistent with an existing collec-
6 tive bargaining agreement. Therefore, I find that EMC did violate
7 RCM 59-1605(1)(e) in negotiating the retirement agreements with
8 Mr. Thompson and Mr. Miller.

9 Part 3, Charge #3

10 Interference in the exercise of rights of employees
11 guaranteed in Section 3(59-1603), 59-1605(a), (b)
R.C.M., 1947.

12 The President of Eastern Montana College has
13 called faculty meetings at which articles of the
14 contract and matters under negotiation were placed on
15 the agenda and discussed on February 28, 1978; April 4,
16 1978; May 2, 1978; and May 16, 1978.

17 Section 59-1603(3):

18 Labor organizations designed in accordance with
19 the provisions of this act are responsible for repre-
20 senting the interest of all employees in the exclusive
21 bargaining unit without discrimination for the purposes
22 of collective bargaining with respect to rates of pay,
23 hours, fringe benefits and other conditions of employ-
24 ment.

25 Section 59-1605(1)(a)(b):

26 It is an unfair labor practice for a public employer
27 to (a) interfere with, restrain, or coerce employees in
28 the exercise of the rights guaranteed in section 59-1603
29 of this act; (b) dominate, interfere or assist in the
30 formation or administration of any labor organization;...

31 Section 59-1605(1)(a) and (b) is parallel to Section 8(d)(1)
32 and (2) of the NLRA (29 USCS Section 158(a)(1) and (2)) There
33 is no provision in the Montana Act similar to NLRA Section 8(c):

34 The expressing of any views, arguments, or opinion or
35 the dissemination thereof, whether in written, printed,
36 graphic or visual form, shall not constitute or be
37 evidence of an unfair labor practice under any of the
38 provisions of this Act, if such expressions contain no
39 threat of reprisal or force or promise of benefit.

40 However, the U.S. Supreme Court in NLRB v. Gissel Packing⁹
41 held that Section 8(c) of the NLRA "merely implements the First
42

9. NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRM 2481 reh den 396 U.S. 869 (1969).

1 Amendment by requiring that the expression of any views, argument
2 or opinion" shall not be "evidence of an unfair labor practice"
3 so long as such expression contains "no threat of reprisal or
4 force or promise of benefit in violation of Section 8(a)(1)."

5 Testimony by AAUP members in regard to Charge 3 emphasized
6 the fact that John Van deWetering is the President of EMC and
7 because of that fact his discussing subject matters under negoti-
8 ation at a faculty meeting interfered with the rights of members
9 of the bargaining unit.

10 Evidence for the complainant does not address the content of
11 the remarks made by Dr. Van deWetering beyond the subject matter
12 discussed.

13 An employer's free speech right to communicate his views to
14 his employees is firmly established and cannot be infringed upon
15 by the board.¹⁰

16 I find that complainant has not shown that EMC violated
17 59-1605(1)(a) or (b).

18 CONCLUSIONS OF LAW

19 I find that E.M.C. violated Section 59-1605(1)(c) and (e)
20 R.C.M., 1947 by unilaterally altering the salaries for new hires
21 for the years 1977-78 and 1978-79.

22 I find that E.M.C. did violate Section 59-1605(1)(e) as
23 specified in Item 3 of Charge 2 but did not violate Section
24 59-1605(1)(e) as specified in Items 1, 2, and 4 of Charge 2.

25 I find that E.M.C. did not violate 59-1605(1)(a) and (b) as
26 stated in Charge 3 of ULP 16-78.

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32 10. NLRB v. Gissel, supra note 9.

RECOMMENDED ORDER

The hearing on amended ULP 16-78 was held on October 5, 1978. Since the hearing, EMC and AAUP have successfully negotiated a Collective Bargaining Agreement effective July 1, 1977 through June 30, 1979. The fact that the efforts of the parties culminated in a negotiated contract speaks directly to the issue of bargaining in good faith. The negotiated contract remedied the 59-1605 (1) (e) R.C.M., 1947 [39-31-401(5) MCA] violations. Therefore, this recommended order contains no additional remedies for the 59-1605 (1) (e) R.C.M., 1947 violations."

Eastern Montana College is ORDERED to cease and desist violating 59-1605 (1) (c), R.C.M., 1947 [39-31-401(3) MCA] by paying new faculty hires a different salary than the salary paid similarly situated faculty members.

Dated this 10th day of August 1979.

BOARD OF PERSONNEL APPEALS

By Kathryn Walker
Kathryn Walker
Hearing Examiner

NOTICE

Written exceptions may be filed to these Findings of Fact, Conclusions of Law, and Recommended Order within twenty days after service thereof. If no exceptions are filed with the Board of Personnel Appeals within that period of time, the Recommended Order shall become the Final Order of the Board of Personnel Appeals. Exceptions shall be addressed to the Board of Personnel Appeals, Capitol Station, Helena, Montana 59601.

11. Complainant requested a remedy regarding the furnishing of information to the exclusive bargaining representative. ULP 16-78 did not charge EMC with failure to supply information.